IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.420 OF 2004
IN
SUMMARY SUIT NO.1326 OF 2004

Shriyam Broking Intermediary Ltd. ....Plaintiff
V/s.
Maharashtra Krishna Valley Dev.Corpn. ....Defendants

Mr.Virag Tulzapurkar with Mr.A.S. Doctor i/b M/s.Junnarkar & Associates for the Plaintiff.

None for the Defendants.

CORAM : S.J. VAZIFDAR, J.
DATED : 22ND AUGUST, 2005.

P.C. :

1. The suit is filed to recover an amount of Rs.56,33,000/- being the amount due under an M.O.U. dated 12th November, 2001 entered into between the Plaintiff and the Defendant.

2. Prior to execution of the M.O.U., by a letter dated 28th September, 2001, the Defendants appointed the Plaintiff as Lead Arranger of a bond issue promoted by the Defendants on the terms and conditions mentioned therein. Condition No.6 reads as under :-

"6. Fee / Service Charges : a) The Arranger(s) will be

> paid total service charges at the rate of 0.2%% (zero point two percent) of the amount subscribed and retained by the Corporation".

. The letter contemplates the parties entering into of regular contract on the terms and conditions mentioned therein.

3. Pursuant thereto the said M.O.U. dated 12th November, 2001 was executed. The defence, if it can be termed as such, pertains to clause (C) thereof which reads as under :-

> "C). The Lead Arranger shall be entitled to receive as fees for services as Lead Arranger, rendered by them for the private placement of the MKVDC bonds @ 0.2% (Zero Point Two Percent) of amount retained. The fees shall be all inclusive and no out of pocket expenses etc. shall be paid. The fees shall be paid in two instalments. The first instalment of fees equal to 90% of the total fees payable shall be paid after the

> issue is fully subscribed including retention of over subscription. The second instalment of fees equal of 10% of the total fees payable shall be paid after the post issue services part excluding dispatch of letters of allotments is completed. The Lead Arranger shall present necessary bills for the payment of fees at appropriate time after the service to be rendered is completed, giving documentation in support thereof, wherever necessary".

4. The amount retained pursuant to the bond issue was Rs.439.69 crores. The Plaintiff's dues calculated as per the MOU is Rs.87,93,800=00. The Defendants have made part payment of Rs.37,60,800/- leaving the balance now claimed in the suit.

5. The main defence is to be found in paragraphs (e), (f) and (i) of the affidavit in reply dated 5th October, 2004. The Defendants contended therein that a copy of the M.O.U. annexed to the plaint is bogus. The Defendants thereafter sets out what according to them is the actual wording of Clause (C). According to the Defendants Clause (C) reads as under :-

"The arranger shall be entitled to receive as fees for services as Lead Arranger rendered by him for the private placement of the MKVDC bonds @ 0.2% (zero point two percent) of amount retained. Fees will be paid to the Lead Arranger in the proportion of the amount procured by him limited to the total amount retained by the Corporation. The fees shall be all inclusive and no out of pocket expenses etc. shall be paid in three instalments. The first instalment of fees equal to 70% of the total fees payable shall be paid after the issue is closed and the subscription after due reconciliation is taken on record by the issuer. The second instalment of fees equal to 20% of the total fees payable shall be paid after the post issue services part excluding dispatch of letters of allotments is completed. The third instalment of fees equal to 10% of the total fees payable shall be paid after the dispatch of letter of allotment is completed. The arrangers shall present necessary bills for the payable of fees at appropriate time after the respective part of service to be rendered is completed, giving documentation

in support thereof wherever necessary".

6. The main difference therefore is that according to the Defendants the fees to be paid to the Plaintiff is to be calculated only in respect of the amount of deposits procured by the Plaintiff. In paragraph "(i)" the Defendants stated that they came to know about the alleged change by the Plaintiffs in the MOU when the present affidavit was being prepared. The Defendants further state that after verifying the original MOU, it is understood that initially the MOU was prepared at Pune, signatures were obtained at Mumbai, where the office of the signatory on behalf of the Defendant was, and thereafter the same was sent back to Pune.

7. In view of this defence, by an order dated 12.4.2005, D.G. Karnik, J. recorded that the Defendants contended that a copy of the MOU annexed to the plaint is not true and correct. The Defendants were directed to produce the original MOU in their possession in a sealed cover before the Prothonotary & Senior Master and to file a true xerox copy of the MOU with an affidavit in this Court.

8. An affidavit dated 25.4.2005, was thereafter

filed by the Defendants. The Defendants have not appeared before me today. It is therefore not possible to ascertain whether they have complied with the order by producing the original MOU in a sealed cover before the Prothonotary & Senior Master. A xerox copy of the MOU has been annexed to the affidavit dated 25.4.2005. That however is an unsigned copy. It is not a true xerox copy of the original. That MOU is neither signed nor dated. It contains blanks. Thus the latter part of the said order dated 12.4.2005 has not been complied with.

9. It is important to note paragraph 3 of this affidavit, which reads as under :-

> "3. In para (i) of the said Affidavit, the contents regarding the preparation of the draft MOU (Memorandum of Understanding) at Pune, is correct. This draft MOU, which is an original one draft was sent to the Plaintiff at Mumbai, for their approval and the copy of the original draft MOU was retained in the MKVDC office at Pune. I further say that the original draft MOU remained with the Plaintiff and the Plaintiff had sent it’s own draft of MOU to Shri N.D.

> Vadnere, then E.D. of MKVDC, who happened to be in Mumbai for his other official work in Mantralaya, where Shri N.D. Vadnere, signed the MOU draft, which was prepared by the Plaintiff at Mumbai. Hereto annexed & marked at Exhibit 'A' is a copy of the said Draft M.O.U. sent by Defendant to the Plaintiff."

10. It is thus clearly admitted that the MOU relied upon by the Defendants was not executed by the parties. More important, it ought to be noted that the MOU relied upon by the Plaintiff is admitted by the Defendants to have been executed by both the parties. It is clear therefore,that the defence taken in the affidavit in reply dated 5th October, 2004 was false.

11. The Defendants' case in the affidavit dated 5th October, 2004 is belied by various other factors as well. The Plaintiffs forwarded their invoice on 21st May, 2002. The Plaintiffs thereafter addressed three letters demanding payment dated 15th June, 2002, 3rd July, 2002 and 26th July, 2002. There was no denial of the Plaintiff's claim. Indeed it is crucial to note that by a letter dated 26th August, 2002, the Defendants stated that "we will shortly releasing

payment for the above. Till then kindly bear with us". There was not a whisper challenging the validity of the Plaintiff's claim.

12. Thereafter the Defendants made part payment amounting to Rs.31,60,800/-. Even at that stage, the payments were not qualified by stating that the demand was not justified as per the MOU.

13 As a large amount remained outstanding, the Plaintiffs addressed a further reminder to the Defendants in respect thereof. Yet again there was no challenge of the Plaintiff's claim.

14. The falsity of the Defendants' case is also exposed by the fact that a similar agreement dated 27.2.2003 was also executed between the parties in respect of another bond issue. This MOU contains a term identical to the one reproduced in the copy of the MOU relied upon by the Plaintiff, in so far as it is relevant to the present defence (instalments were different). Thus there is no question of the MOU having been signed by the Defendants by mistake.

15. Thus, there is no defence to the suit. The defence raised by the Defendant is ex-facie false.

16. In the circumstances, the Summons for Judgment is made absolute and the Suit is decreed as prayed with costs.